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SUPREME COURT, U.S.

81-5158

No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TIMOTHY CHARLES PALMES,

Petitioner,

-v.-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

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ATTORNEY OF RECORD

QUESTIONS PRESENTED

Where there is evidence that a murder suspect under interrogation at least fitfully desired to consult with counsel and where appointed counsel through slipshod procedure failed to contact him and sheriff's personnel continued to interrogate without reference to counsel although they know counsel has been appointed, quaere whether an intelligent and voluntary waiver of the right to counsel and the right against self-incrimination can be said to have taken place.

Quaere whether a court's pre-trial hearing determination of a confession's voluntariness prevents a jury's second look at the voluntariness issue with a full hearing of all relevant evidence.

Finally, is the propounding of a lesser included offense instruction dependent on the offense's statutory definition as a discrete lesser part of a greater offense or does the lesser offenses' being described by a portion of the entire fact pattern alleged by the prosecution suffice? Would the giving of a lesser offense instruction have reduced the likelihood of a faulty determination of guilt?

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Florida.

CITATION TO THE OPINION BELOW

The opinion of the Supreme court of Florida, Palmes v. State, 397 So.2d 648 (Fla. 1981) is set out in Appendix A infra.

JURISDICTION

The judgment of the Supreme court of Florida was entered on March 5, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

On October 4, 1976, James N. Stone was lured to an apartment in Jacksonville, Florida occupied by the instant petitioner, Timothy C. Palmes, his friend Ronald Straight, his (at that time) girlfriend Jane Albert and Mrs. Albert's daughter Stephanie. Stone had been attracted by the promise of an assignation with a young girl named Nancy. Not too long after arriving at the apartment, Stone was struck on the head three times with a hammer, possibly rendering him unconscious, and then stabbed to death with a butcher knife. His body was placed either during or immediately after the assault in a large wooden box which Palmes later testified he had been preparing as a toy chest for Stephanie.

State's evidence as provided by Mrs. Albert at petitioner's trial declared the killers to be petitioner and Ronald Straight and ascribed the motivation to anger and resentment at Stone for turning down the alleged killers' proposition for collecting delinquent accounts from the victim's furniture store. Petitioner testified that he had an alibi and that the murder was committed by Mrs. Albert, angry that Stone was closing down the furniture store where she worked for him instead of giving her more responsibility and income as well as outright ownership of a Volkswagen used in connection with the furniture store work.

In any event, Palmes and Straight dumped the box containing Stone's body into the St. John's River off the Buckman Bridge the next day. Palmes, Straight, Mrs. Albert and Stephanie Albert fled in Stone's car to Atlanta and then moved on to the West Coast. On October 11, 1976 they were apprehended at a motel in Anaheim. Palmes made no attempt to flee when he saw the police holding Mrs. Albert, and he did not resist extradition from California to Florida because he wanted to be with her, as near as possible.

Petitioner was first interviewed by Sergeant Miles of the Jacksonville sheriff's office on October 22, 1976. No waiver of rights to counsel and against self-incrimination was signed at that time. On the 23rd, Palmes appeared before Judge Marees, who assigned the Public Defender's Office to represent him. The Public Defender's Office, probably through procedural inefficiency, never contacted Palmes and, in fact, only first moved on the case on October 29 to file a motion asking to withdraw on conflict-of-interest grounds.

Members of the Sheriff's Office were apprized of Judge Marees' action in assigning Palmes counsel but nevertheless continued to interrogate him and made no attempt to allow for interposition of counsel. On the 24th, Sergeant Miles read Palmes Jane Albert's sworn statement implicating him and Ronald Straight in the murder several times. Palmes still refuse to sign a waiver but allowed himself to be transported to the police homicide office at 7:00 p.m. on the promise that he be allowed to speak to Jane Albert. He languished at the homicide office until almost midnight before being allowed a telephone conversation with Jane Albert, who communicated that she wished to wash her hands

of him. Dismayed, Palmes showed police where he and Ronald Straight dumped the box containing Stone's body into the St. John's River.

Sergeant Miles was told that Palmes wished to see him on the 29th. Knowing that Palmes had been indicted on the 28th for Stone's murder, Miles still did not seek to find out whether any counsel or the public defender was avaiable to Palmes and allow for their lawful interposition but sought to continue to urge Palmes to confess. The latter had been told that police authorities were "thinking of" granting Mrs. Albert immunity for her testimony against the other two, never that they had actually done so, during the week October 22-29. Fearful for Mrs. Albert's safety and well-being, on the 29th Palmes confessed to the murder of James Stone; he also implicated Ronald Straight in an attempt to have his story jibe with Mrs. Albert's.

Prior to trial, the court held a hearing on the voluntariness of Palmes confession, it having been taken after long interrogation in the absence of counsel. The court decided the confession was voluntary. At trial, the defendant attempted to put into evidence that in the week of October 22-29 he had wanted counsel despite his obsessive dwelling on Jane Albert's plight and the possibility of a future for them together. Despite her initial tending to wanting to admit the testimony, the judge eventually sustained the prosecution's objection that voluntariness of confession had been disposed of at the pre-trial suppression hearing and that therefore the defendant's testimony regarding his wish for a lawyer during interrogation by Jacksonville police was irrelevant.

Palmes maintained at trial that his only involvement with the murder had been as an accessory after the fact in dumping the corpus delicti from the Buckman Bridge. Nevertheless, the court denied his request for an accessory after the fact instruction to the jury and restricted its instructions on substantive crimes to various kinds of homicide.

On April 8, 1977 the jury pronounced petitioner guilty of first degree murder. After the sentencing hearing on June 22, 1977, the judge read from a pre-prepared sentencing memorandum to condemn petitioner to death. His appeal to the Florida Supreme Court resulted in affirmance on March 5, 1981, and rehearing there was denied on May 20, 1981.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PRESENTED BELOW

Counsel for the Florida Supreme Court appeal pointed out in an extensive brief that petitioner had been denied his right to counsel and incriminated himself, while still from time to time wishing the intervention of counsel, without making a valid waiver of his rights. The Florida Supreme Court stated merely that petitioner had been advised repeatedly of his right to counsel while in pre-trial custody.

Counsel on the Florida appeal successfully argued to the Florida Supreme Court that petitioner's testimony as to his state of mind going to voluntariness at the time he made confession was relevant and should have been admitted into evidence by the trial court. However, the Florida Supreme Court found that this error below was not substantial enough to work heavy prejudice on the petitioner's rights and therefore did not require reversal.

To get his day in court, appellate counsel below argued, petitioner needed to present his theory of his involvement in the crime through a lesser included offense instruction to the jury. By statute, the Florida Supreme Court found that accessory after the fact was not a lesser included offense of premeditated homicide. (The problem of faulty determinations of guilt occasioned by refusals to give lesser included offense instructions was neither raised, nor alluded to by the court.)

REASONS FOR GRANTING THE WRIT

The instant case tests squarely how actually effective the rights to advice of counsel and against self-incrimination, guaranteed by Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), are where a statement is made after long police interrogation without counsel, especially where as here assigned defense counsel's slipshod procedures prevented consultation before a statement was taken and police authorities blithely ignored the fact that counsel had been assigned.

At the centerpiece of American jurisprudence is the notion that every criminal defendant is entitled to an accusatory rather than an inquisitorial trial; this trial must be fundamentally fair as fairness is defined by the Fourteenth Amendment's guarantees of due process and equal protection of laws. Brown v. Wainwright, 459 F.Supp. 244 (1978); Painter V. Leeke, 485 F.2d 247 (1973); Fitzgerald v. Estelle, 505 F.2d 1334, cert denied 422 U.S. 1011 (1974); cf. Patterson v. Medberry, 290 F.2d 275 (1961), cert. denied

368 U.S. 839. Assistance of counsel must be afforded at every critical stage of a felony proceeding (certainly after indictment) in state court, U.S. ex rel Miner v. Erickson, 428 F.2d 623 (1970). State defendants have a right to counsel unless that right is "knowingly and intelligently waived," Carnley v. Cochran, 369 U.S. 506 at 516-517 (1962). Accord Rohrer v. Montana, 237 F.Supp. 747 (1964). A criminal defendant's right to counsel and to remain silent attach at the end of the general inquiry into the crime stage and the beginning of direct focus on an individual suspect, Escobedo v. Illinois, 378 U.S. 478 (1964). As in the instant case, where a judge had assigned your petitioner counsel, who for procedural reasons never came on the interrogation scene, Escobedo already had counsel when he made his self-incriminating statement. This counsel was denied access to him by the police, and the court held Escobedo's statement inadmissable.

In the instant case, sheriff's office personnel had continued to interrogate the petitioner after learning that counsel, the public defender's office, had been assigned to him. They obtained an inculpatory statement after petitioner's indictment without his being aided by counsel, cf. Massiah v. U.S., 377 U.S. 201 (1964). Petitioner established at trial, however briefly and skeletally, before the prosecutor's objection to the line of questioning, that he had wanted counsel during his week of interrogation October 22-29. In the last analysis, the argument of the office of the Florida Attorney General in the court below was not that petitioner's right to counsel had not been violated, but, that if it had, in the melodramatically colorful language of

the Attorney General," ... it would not have made a dime's worth of difference if Appellant and had counsel every hour on the hour prior to making such confession" since petitioner was said not to have wanted counsel (clearly contradicted at trial) and impliedly his willingness to make a statement would not have been altered by counsel's presence. True, petitioner had an idee fixe about protecting the welfare of his faithless and antagonistic paramour, Jane Albert, but even in the grip of a largely self-destructive delusion, he still, at moments, had a desire to protect his own interests by consulting with counsel. Waiver of counsel cannot be lightly presumed, Ford v. Wainwright, 526 F.2d 919 at 922 (1976); Johnson v. Zerbst, 304 U.S. 458 (1938); U.S. v. Montos, 421 F.2d 215 (1970); cert. denied 397 U.S. 1022. Common sense indicates that any basically competent attorney intervening during the interrogation period would have shown petitioner the self-destructive folly of his ultra-romantic delusions about Jane Albert and reawakened his latent desire to protect his own interests, as evinced by his desire to summon the assistance of an attorney. An attorney's active intervention during the period of October 22-29, 1976 would have made far more than a "dime's worth of difference" to the trial of petitioner.

When interrogation of an individual by police continues without the presence of an attorney and a statement is taken a heavy burden rests on the government to show that the defendant knowingly and intelligently his privilege against self-incrimination and his right to consult counsel. The fact of lengthy interrogation, as here (October 22-29) without counsel, before a statement is made, may suggest the accused did not voluntarily waive his right to counsel and was overborne by the weight of interrogation. Miranda v. Arizona,

384 U.S. 436 (1966). Even outright, complete failure of a state defendant to request counsel during interrogations which led to a confession does not necessarily amount to effective waiver of the right to counsel, Russo v. State of New Jersey, 351 F.2d 429 (1965) vacated 384 U.S. 889, certiorari denied 384 U.S. 1012; accord Galarza Cruz v. Delgado, 233 F.Supp. 944 (1964) vacated 363 F.2d 430; cf. where a magistrate intervenes and makes the judgment defendant is too distraught to waive his rights knowingly and intelligently, Sample v. Eyman, 469 F.2d 819 (1972).

The federal courts have recognized that strong concern for the welfare of a third party close to defendant and fear of some imminent harm coming to him or them, which, in the defendant's mind, could be obviated by cooperation with the police, will be a factor which may strongly contravene the voluntariness and intelligence of a waiver of the rights to counsel and against self-incrimination -- concern about wife's incarceration U.S. v. Hill, 340 F.Supp. 344 (1972) and concern that cohort would harm defendant's children, U.S. v. Barber, 291 F.Supp. 38 (1968). Here, petitioner's romantic entanglement with Jane Albert clearly presents an overpowering emotional force equivalent to concern for a blood or cognative relation.

A further issue raised by the Palmes case relates to presentation of Palmes' desire for counsel during the interrogation period prior to his making an inculpatory statement. When Palmes began to testify to this desire, the state's attorney, instead of waiting to challenge Palmes' assertion on cross-examination objected that the issue of voluntariness of the confession had been decided affirmatively at a pre-trial suppression hearing before the judge

and that the jury was not entitled to consider again the issue of voluntariness of the confession. Therefore any testimony of the defendant as to his desire for legal representation during the interrogation period was irrelevant. Although at first evincing a desire to hear your instant petitioner on issue of his wish to be represented by counsel at the interrogation stage, the court eventually upheld the state's attorney's objection (trial transcript 810-817).

While Jackson v. Denno, 378 U.S. 368 (1968) bifurcated the jury's process of evaluating the truthfulness and voluntariness of a confession, most U.S. jurisdictions have interpreted this decision to mean that the jury is allowed a second, separate look, with the receipt and hearing of all relevant evidence, at the voluntariness of a confession after the issue has been decided affirmatively in a pretrial hearing before the judge. Florida stands in firm support of this line of reasoning, State v. Oyarzo, 274 So. 2d 519, 521 (1973). U.S. ex rel Colwell v. Rundle, 251 F.Supp. 118 (1966) emphasizes that the trial judge must inquire thoroughly as to all aspects of voluntariness. The jury at trial has no less a responsibility according to the majority view taken in the federal courts.

> Under that decision [Jackson v. Denno] the trial court must decide initially the question of admissability, resolving the issue of voluntariness one way or the other. If the court finds involuntariness the court must exclude the confession; it never goes to the jury for any purpose. If the court concludes that the confession is voluntary it is admitted in evidence; but the jury is not bound by this ruling of the court on voluntariness. Under appropriate instructions it may decide the confession was involuntary, in which event the jury must disregard it. Hutcherson v. U.S. 351 F.2d 748 at 754 (1965); accord Curtis v. U.S., 349 F.2d 718 (1965);

Kulyk v. U.S., 414 F.2d 139 (1969); U.S. v. Inman, 352 F.2d 954 (1965); U.S. v. Edick, 432 F.2d 350 (1970).

The only case your petitioner could find in the federal courts running contra to the proposition of the jury's second look at any confession's voluntariness is, Tucker v. U.S. 375 F.2d 363 (1967).

When, relying on the confession as a main prop in the strategy to convict defendants, our system of justice tends away from the accusatory to the inquisitional mode, the issue of voluntariness of the confession becomes a matter of no small moment; ignoring it at trial is not a minor, non-reversible error. To say that failure to explore fairly and fully the issue of voluntariness of the confession works no substantial prejudice to defendant's cause is to miss the meaning of the mode of trial based on the confession and accomplice testimony. At the very least, reviewing authority should direct that all facts surrounding the confession should be explored in another trial below, cf. Malat v. Riddell, 383 U.S. 569 at 572 (1966).

A final issue presented by the case at bar is whether, when the defense proffers a theory of guilt of a lesser included offense, described by a portion of the facts alleged by the prosecution but not, by formal statute, a lesser included offense of Florida's homicide law, the defense may obtain a lesser included offense instruction to the jury. Here the petitioner offered an alibi and an admission that he had helped to dispose of the corpus delicti in the St. John's River. Was he therefore entitled to a lesser included offense instruction of accessory after the fact? The Florida Supreme Court said "no" because accessory after the fact is not by formal recitation of Florida murder statute a lesser included offense of homicide.

However, this court and other federal courts have found fact-pattern analysis to be the pre-eminent guide to deciding whether a lesser included offense instruction is proper. Generally, the instruction is proper where

> the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense. Sansone v. U.S., 380 U.S. 343, 350 (1965). Accord U.S. v. Klugman, 506 F.2d 1378 at 138 (1974).

and an instruction is also proper where

> elements of the lesser offense are identical to part of elements of the greater offense. U.S. v. Thompson, 492 F.2d 359 (1974).

The literal statutorily included approach adopted by the Florida Supreme Court and activating the decision below might work a de facto abolition of the distinction between principal and accessory crimes, a result actually sought by the state legislative in Montana, see Quigg v. Crist, 616 F.2d 1107 (1980), but never actually envisioned by Florida lawmakers.

U.S. v. Stolarz, 550 F.2d 488 (1977) contains language amounting to a polymorphous approach to lesser included offense that offers aid and comfort to both sides of this debate, yet it makes an important contribution in advancing a test of "inherent relationship" between two offenses to determine what is a lesser included offense. "... [T]he two offenses must relate to protection of the same interests ..." 550 F.2d 488 at 491. Here the interest in deterring and punishing homicide is surely related to an interest in preventing concealment of a homicide after the fact. Thus, by Stolarz, accessory after the fact is a lesser included offense of homicide.

In Beck v. Alabama, 447 U.S. 625 (1980), the petitioner was tried only for intentional murder and did not receive a lesser included offense felony murder instruction. He maintained his accomplice struck and killed the victim, a result which he, Beck, never intended. The failure to give the lesser included instruction he maintained, substantially increased the risk of error in the fact-finding process where the judge emphasized to the jury that if he were found innocent of intentional murder "he must be discharged" and "he can never be tried for anything he did to Roy Malone."

Although the lesser included offense option was a flexibility device originally intended to benefit the prosecution (see Salinas v. U.S., 277 F.2d 914 (1960) and Bradley v. Beto, 473 F.2d 1039 (1973)), the Beck court found that the jury's option to convict of a lesser included offense preserved the reasonable doubt standard for defendant's benefit. The lesser included offense option becomes doubly important where it is sought to impose the death penalty in a reasonable and non-capricious manner

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted, conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case. Beck, supra, 447 U.S. 625, at 638.

Finally, the lesser included offense instruction should have been allowed as the logical outcome of the process where the defendant is simply allowed to tell his side of the story. Due process is violated when a defendant is effectively prevented from exploring accusations that another person committed the crime for which he stands accused,

Truman v. Wainwright, 514 F.2d 150. Part and parcel of the right to such "exploration" must be a right to put the defendant's theory before the jury as it deliberates.

Where so much procedural error has occurred below both before and during trial it is submitted that imposition of the supreme penalty with its unique character of irreversibility (see Furman v. Georgia, 408 U.S. 238 (1972)) would be short-sighted.

CONCLUSION

The writ of certiorari should be granted.

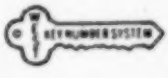
"(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act."

376 So.2d at 1169-70. Judge Hubbart, who authored *Sarmiento*, dissented from *Franco* on the basis that the recording was a prohibited invasion of Franco's rights under article I, section 12, Florida Constitution.

In its subsequent decision of *Trinidad v. State*, 388 So.2d 1063 (Fla. 3d DCA 1980), the Third District questioned the viability of its decision in *Sarmiento* in light of *State v. Scott*.

I find that Sarmiento's rights under article I, section 12, Florida Constitution, and the fourth amendment to the United States Constitution were not violated when the officers monitored the conversation between the defendant and the undercover detective. Accordingly, I would quash the decision of the district court insofar as it holds that the testimony of the monitoring police officers was inadmissible.

BOYD, J., concurs.



Timothy Charles PALMES, Appellant,

v.

STATE of Florida, Appellee.

No. 52045.

Supreme Court of Florida.

March 5, 1981.

Rehearing Denied May 20, 1981.

The Circuit Court, Duval County, Virginia Q. Beverly, J., found defendant guilty of capital murder and imposed the death penalty, and appeal was taken. The Supreme Court held that: (1) admission of confession made without representation by attorney was not error; (2) refusal to permit defendant to testify as to his state of mind at time of confession was error but was harmless; and (3) imposition of death penalty was proper.

Affirmed.

1. Criminal Law ⇐641.11

Formal appointment of public defender at first appearance did not initiate legal representation since nothing was done toward actually providing legal counsel.

2. Criminal Law ⇐412.2(5)

Right to counsel during questioning can be waived and investigating officers are not required to try to convince defendant that he needs attorney.

3. Criminal Law ⇐517.2(1)

Where defendant had been repeatedly advised of his right to consult with counsel and to have counsel present during questioning, and interview at which defendant made recorded confession took place at his own request, admission of confession was proper even though defendant had been indicted and was without counsel.

4. Criminal Law ⇐770(2)

Defendant is entitled to jury instruction on theory of his defense.

5. Criminal Law ⇐772(6)

That defendant committed crime other than one he is charged with is not a legal defense requiring jury instruction.

6. Indictment and Information ⇐189(8)

Crime of accessory after the fact is not a lesser included offense of crime of premeditated murder.

7. Criminal Law ⇐881(2)

Conviction on charge that was not supported by facts alleged in indictment would not be valid.

8. Homicide ⇐305

Defendant who was charged with capital murder and who claimed he was merely accessory after the fact was not entitled to instruction on crime of accessory after the fact.

9. Criminal Law ⇐516

Question of admissibility in evidence of extrajudicial confession is for court to decide, based on all circumstances of confession.

10. Criminal Law ⇐531(4)

Once confession is admitted into evidence, defendant is entitled to present to jury evidence pertaining to circumstances under which confession was made.

11. Criminal Law ⇐741(3)

It is jury's function to determine weight to be accorded confession in determining guilt.

12. Criminal Law ⇐531(4)

In absence of threats, promises, or the like, defendant's testimony about his state of mind at time of confession would be irrelevant at pretrial suppression hearing.

13. Criminal Law ⇐338(3)

Defendant's state of mind at time he made confession is relevant at trial for purposes of determining guilt.

14. Criminal Law ⇐338(3)

It was error for trial court not to admit testimony as to defendant's state of mind at time he made confession.

15. Criminal Law ⇐1165(1)

Judgment will not be reversed unless error was prejudicial to substantial right of defendant. West's F.S.A. § 924.33.

16. Criminal Law ⇐1134(1)

Court, in capital case, will carefully scrutinize any error before determining it to be harmless but will not presume that there was prejudice.

17. Criminal Law ⇐1134(2)

In determining whether erroneous trial court ruling caused harm to substantial rights of defendant, appellate court considers all relevant circumstances, including any curative ruling or event and general weight and quality of evidence.

18. Criminal Law ⇐1165(1)

When error affects constitutional right of defendant, reviewing court may not find it harmless if there is reasonable possibility that error may have contributed to accused's conviction or if error may not be found harmless beyond reasonable doubt. West's F.S.A. § 924.33.

19. Criminal Law ⇐1165(1)

Even constitutional error may be treated as harmless where evidence of guilt is overwhelming. West's F.S.A. § 924.33.

20. Criminal Law ⇐531(2), 1169.2(6)

It is error not to receive in evidence all circumstances attending an extrajudicial confession but error is harmless where substantially same matters are presented to jury through testimony of same or some other witness. West's F.S.A. § 924.33.

21. Criminal Law ⇐1170(1)

Under the circumstances including fact that similar testimony was received, error in trial court's refusal to permit defendant to testify as to his state of mind at time of confession was harmless. West's F.S.A. § 924.33.

22. Criminal Law ⇐885

One who has been convicted of a capital crime and faces sentencing may waive his right to jury recommendation, provided waiver is voluntary and intelligent.

23. Criminal Law ⇐1208(1)

Upon finding that defendant convicted of capital crime has waived right to jury recommendation of sentencing, sentencing court may in its discretion hold sentencing hearing before jury and receive recommendation or may dispense with that procedure.

24. Criminal Law ⇐1208(1)

Fact that judge recited findings from an order prepared before final sentencing hearing in capital case did not compel conclusion that judge did not give required consideration to evidence presented by defense.

25. Criminal Law ⇐1208(1)

Fact that preprepared order for sentencing in capital case found that there were no mitigating circumstances did not show that judge did not consider evidence on argument offered in mitigation.

26. Homicide ⇐354

Conviction for manslaughter pursuant to guilty plea in prosecution initiated by indictment charging first-degree murder could be considered as aggravating circumstance in capital case. West's F.S.A. § 921.141(5)(b).

27. Homicide ⇐354

Factor of commission of homicide in connection with robbery and factor of pecuniary gain were both based on same aspect of crime and could constitute only one aggravating circumstance for purposes of sentencing in capital case. West's F.S.A. § 921.141(5)(d, f).

28. Criminal Law ⇐1177

In capital sentencing case, court's improper double recitation of factor of robbery and pecuniary gain, which were single factor, was harmless error. West's F.S.A. § 921.141(5)(d, f).

29. Criminal Law ⇐1208(1)

Record in capital sentencing case sustained finding that no mitigating circumstances were present.

30. Homicide ⇐354

Record in capital sentencing case sustained finding that murder was especially heinous, atrocious, and cruel. West's F.S.A. § 921.141(5)(h).

B. Kenneth Vickers and Steven E. Rohan, Jacksonville, for appellant.

Jim Smith, Atty. Gen., and Carolyn M. Snurkowski, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

This cause is before the Court on appeal from a judgment of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County. The appellant was convicted of murder in the first degree and sentenced to death. We have jurisdiction. Art. V, § 3(b)(1), Fla.Const. We affirm the conviction and sentence.

Appellant lived in an apartment with his girlfriend Jane Albert, her daughter Stephanie, and a friend, Ronald Straight. The appellant became acquainted with Ms. Albert's employer James Stone. The evidence showed that appellant, Albert, and Straight plotted the murder and robbery of Stone.

On October 3, 1976, appellant, Straight, and Albert purchased lumber, hardware, and cement from which appellant built a box large enough to hold a man's body. The next day Albert told her employer that a girl named Nancy was waiting for him at the apartment. She then called appellant to let him know that Stone was on his way. Appellant told Stephanie to answer the door and tell Mr. Stone that Nancy was waiting in the back bedroom. Ronald Straight waited behind the front door with a gun. After Stone entered the apartment, Straight directed him to the back bedroom where appellant was waiting. The two men then bound Stone's hands and feet with wire and taped his mouth. They placed a garbage bag over his head and hit him with a hammer and stabbed him approximately eighteen times. This sequence of events took about a half an hour. At one point appellant had the child, Stephanie, come into the room and observe the victim lying in the burial box, mortally wounded.

The next day appellant and Straight moved their possessions, together with the box containing the body, out of the apartment and into a rental truck. They took possession of the victim's watch, credit cards, and car. Albert took about $3100 in cash from Stone's furniture store. They spent that night at a motel. The next day appellant and Straight drove the rental truck to the Buckman Bridge and threw the box into the St. John's River. The appellant, Straight, Albert, and her daughter fled to California in the victim's automobile.

Police apprehended them in California. Appellant was brought back to Florida and placed in the Duval County jail. On October 22, 1976, police officers advised him of his constitutional rights and questioned him. On October 24, 1976, the officers again advised appellant of his constitutional rights and interrogated him further. They read to him excerpts from a statement made by Jane Albert. He refused to make any statement until after he had spoken to her. Although he declined to sign a written waiver of his rights, he did not request an attorney and he voluntarily answered questions. Afterwards he showed the police officers the place on the bridge where the body was dropped. On October 28, 1976, an indictment was returned accusing appellant of murder in the first degree. On October 29, the appellant asked to see the investigating officers. After again being advised of his rights, the appellant specifically stated that he did not want to see a lawyer. He signed a waiver and made a detailed statement of his participation in the murder. The statement was recorded and signed.

At appellant's first appearance on October 23, 1976, the judge entered an order appointing the public defender to represent him. The office of the public defender never undertook representation, however, and on October 29 requested and was granted permission to withdraw from representation on the ground of conflict of interest. Appellant never met with a representative of that office. Throughout the course of his interrogation by police, he never asked to see an attorney.

Before trial, the appellant moved to suppress evidence of his confession. He argued that the confession was inadmissible because he was questioned without benefit of counsel after being indicted. The motion was denied and appellant's statement was admitted in evidence.

At trial the appellant testified that Albert committed the murder and that his participation was limited to assistance in disposing of the body. He said that he did not notify police because he wanted to protect her and that he confessed to the crime for the same reason. When the appellant attempted to further testify about the circumstances of his confession, the prosecuting attorney objected on the ground of lack of relevance. The court sustained the objection, reasoning that the admissibility of the confession had already been decided and was not relevant to any material issue to be decided by the jury.[1]

At the conference on charging the jury, the appellant requested an instruction on the crime of accessory after the fact. The court declined to give the requested instruction.

The appellant raises a number of points going to the propriety of his conviction, three of which we find merit discussion. He contends that the court erred in refusing to suppress his confession, in refusing to instruct on accessory after the fact, and in refusing to allow him to tell the jury the circumstances of his confession.

I.

The appellant contends that he was denied his fifth and sixth amendment rights to due process and the assistance of counsel because his confession was obtained after indictment and in the absence of counsel. In support of this contention he cites *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Williams v. State*, 188 So.2d 320 (Fla. 2d DCA 1966) *cert. discharged*, 198 So.2d 21 (Fla.1967). *Massiah v. United States* concerned a defendant who, after being indicted, retaining a lawyer, pleading not guilty, and being released on bail, made incriminating statements to one of his codefendants which

1. In sustaining the prosecutor's objection, the judge stated:

> Mr. Greene [the prosecutor] has objected to the line of testimony that was being given, we had argument before the bench, the court has had an opportunity to reflect on it, and the Court is going to sustain the objection in view of the fact that we had an evidentiary hearing on the motion to suppress and this is in substance the same material that was covered at that time at that hearing.

Trial transcript at 817.

were detected by means of a radio transmitter. The Court held the statements inadmissible under the sixth amendment guaranty of the right to assistance of counsel. *Williams v. State* was a case where the investigating officer,

> knowing that the defendant ... had been in jail for three weeks ... that he had already been indicted for first degree murder, and that he had a lawyer and who his lawyer was, took the defendant out of his jail cell and transported him to a small room ... in which room there was only a desk and three chairs. They went inside, closed the door, sat down....

188 So.2d at 326. There the officers elicited an incriminating statement.

[1–3] These cases do not control the situation at bar. In the instant case the defendant had already been indicted but was not yet represented by counsel. He was repeatedly advised of his right to consult with counsel and to have counsel present during questioning. The formal appointment of the public defender at first appearance did not initiate legal representation since nothing was done toward actually providing legal counsel. The interview at which appellant made the recorded confession took place at his own request. He made no request to speak to an attorney and executed a written waiver of counsel. The right to counsel during questioning can be waived. *Witt v. State*, 342 So.2d 497 (Fla.), *cert. denied*, 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 774 (1977). Investigating officers are not required to try to convince a defendant that he needs an attorney. *State v. Craig*, 237 So.2d 737 (Fla.1970). We therefore hold that the court properly admitted the confession into evidence.

II.

The appellant contends that the court erred in not instructing the jury on the crime of accessory after the fact because his defense was that his only participation in the crime was in helping his girlfriend dispose of the body.

[4] It is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense. Florida courts have reversed convictions where juries were not instructed about the defenses of alibi, *Davis v. State*, 254 So.2d 221 (Fla. 3d DCA 1971); *Watson v. State*, 200 So.2d 270 (Fla. 2d DCA 1967); coercion, *Koontz v. State*, 204 So.2d 224 (Fla. 2d DCA 1967), entrapment, *Kwasniewski v. State*, 303 So.2d 373 (Fla. 1st DCA 1974); *Stiglitz v. State*, 270 So.2d 410 (Fla. 4th DCA 1972), justifiable homicide, *Stinson v. State*, 245 So.2d 688 (Fla. 1st DCA 1971); *Whitehead v. State*, 245 So.2d 94 (Fla. 2d DCA 1971), and withdrawal, *Laythe v. State*, 330 So.2d 113 (Fla. 3d DCA), *cert. denied*, 339 So.2d 1172 (Fla. 1976). All these defenses concern either the defendants' innocence or their legal excuse in committing a crime. None of them entail the commission of a crime other than the one charged in the indictment.

[5–8] That a person committed a crime other than the one he is charged with is not a legal defense requiring a jury instruction. Furthermore, the crime of accessory after the fact is not a lesser included offense of the crime of premeditated murder. *Cf. Newkirk v. State*, 222 So.2d 435 (Fla. 3d DCA 1969) (accessory after the fact is a separate offense, not a lesser included offense of robbery). Therefore, the defendant was not entitled to an instruction on accessory after the fact as a lesser included offense. *See State v. Anderson*, 270 So.2d 353 (Fla.1972); *Brown v. State*, 206 So.2d 377 (Fla.1968). If the jury had been instructed about accessory after the fact, a conviction on that charge would not be valid since it would not be supported by the facts alleged in the indictment. *Newkirk v. State*, 222 So.2d 435 (Fla. 3d DCA 1969). Since the jury could not legally convict the defendant of accessory after the fact, no purpose would be served by requiring that they be instructed on the charge. Therefore, the court did not err in refusing to instruct the jury about accessory after the fact either as a defense or as a lesser included offense.

III.

Finally, appellant argues that the trial court erred in sustaining the state's objection to the attempt by defense counsel to elicit from appellant testimony concerning the circumstances of his confession. He contends that by this ruling, the court kept from the jury evidence bearing on the weight to be given to the confession. The trial judge reasoned that this issue was closed once the court determined the confession was voluntary and therefore admissible. We agree that the court erred in this regard, but we conclude that the error does not require reversal.

[9-11] The question of the admissibility in evidence of an extra-judicial confession is for the court to decide, based on all the circumstances of the confession. *See, e. g., Brewer v. State*, 386 So.2d 232 (Fla.1980); *Frazier v. State*, 107 So.2d 16 (Fla.1958); *Coffee v. State*, 25 Fla. 501, 6 So. 493 (1889); *Simon v. State*, 5 Fla. 285 (1853). Once a confession is admitted into evidence, however, the defendant is entitled to present to the jury evidence pertaining to the circumstances under which the confession was made. The reason for this rule is that it is the jury's function to determine the weight to be accorded the confession in determining guilt. *See, e. g., State v. Oyarzo*, 274 So.2d 519 (Fla.1973); *Graham v. State*, 91 So.2d 662 (Fla.1956); *Williams v. State*, 156 Fla. 300, 22 So.2d 821 (1945); *Nickels v. State*, 90 Fla. 659, 106 So. 479 (1925); *Bates v. State*, 78 Fla. 672, 84 So. 373 (1919); *Sims v. State*, 59 Fla. 38, 52 So. 198 (1910); *Bunn v. State*, 363 So.2d 16 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1373 (Fla.1979); *Williams v. State*, 353 So.2d 588 (Fla. 2d DCA 1978), *cert. dismissed*, 372 So.2d 64 (Fla.1979). It is conceivable that a confession, freely and voluntarily given and therefore admissible, may be untrue. Therefore the defendant must be allowed to tell the jury why he made it.

[12-14] It has been said that the application of this rule requires that the evidence presented to show the voluntary nature of the confession must be presented anew for the jury's consideration. *See, e. g., State v. Oyarzo*, 274 So.2d 519 (Fla.1973); *Bates v. State*, 78 Fla. 672, 84 So. 373 (1919). Thus it might be suggested that because appellant did not testify at the pretrial hearing on the admissibility of the confession, he was precluded from giving his personal account of the circumstances for the jury. The functions of the judge and jury, however, are different. It is not the function of the jury to reconsider whether the confession was voluntary. *See, e. g., Kirby v. State*, 44 Fla. 81, 32 So. 836 (1902). At trial, appellant wanted to testify about his state of mind. In the absence of evidence of threats, promises, or the like, this testimony about state of mind would have been irrelevant at the pretrial hearing. *Barton v. State*, 193 So.2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So.2d 459 (Fla.1967). This is because the inquiry at the pretrial hearing on the admissibility of a confession is primarily the question of voluntariness; later, before the jury, the question is what weight to give the confession in determining guilt. The defendant's state of mind is relevant to this latter inquiry. *Reddish v. State*, 167 So.2d 858 (Fla.1964); *Cullaro v. State*, 97 So.2d 40 (Fla. 2d DCA 1957). Therefore the trial court erred in sustaining the objection.

[15, 16] That the trial court's ruling was in error does not necessarily require reversal of the judgment. A judgment will not be reversed unless the error was prejudicial to the substantial rights of the appellant. *Padgett v. State*, 84 Fla. 590, 94 So. 865 (1922); *Kirby v. State*, 44 Fla. 81, 32 So. 836 (1902). This long standing decisional rule has also been enacted as a statute. § 924.-33, Fla.Stat. (1977). Although, in a capital case, this Court will carefully scrutinize any error before determining it to be harmless, *Pait v. State*, 112 So.2d 380 (Fla.1959), it will not presume that there was prejudice. *Salvatore v. State*, 366 So.2d 745 (Fla.1978), *cert. denied*, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1975).

[17] In determining whether an erroneous ruling below caused harm to the substantial rights of the defendant, an appel-

late court considers all the relevant circumstances, including any curative ruling or event and the general weight and quality of the evidence. In other words, the court inquires generally whether, but for the erroneous ruling, it is likely that the result below would have been different. *See, e. g., Campbell v. State*, 227 So.2d 873 (Fla. 1969), *cert. dismissed*, 401 U.S. 801, 91 S.Ct. 7, 27 L.Ed.2d 33 (1970). *State v. Wadsworth*, 210 So.2d 4 (Fla.1968).

[18, 19] When the error affects a constitutional right of the defendant, the reviewing court may not find it harmless "if there is a reasonable possibility that the error may have contributed to the accused's conviction or if the error may not be found harmless beyond a reasonable doubt." *Nowlin v. State*, 346 So.2d 1020, 1024 (Fla. 1977). Even such "constitutional error," however, may be treated as harmless where the evidence of guilt is overwhelming. *Jones v. State*, 332 So.2d 615, 619 (Fla.1976).

[20] While it is error not to receive in evidence "all the circumstances attending an extrajudicial confession ... that the court may determine its admissibility and the jury consider its value," the error is harmless where substantially the same matters are presented to the jury through testimony of the same or some other witness. *Denmark v. State*, 95 Fla. 757, 761, 116 So. 757, 759 (1928); *Baker v. State*, 30 Fla. 41, 11 So. 492 (1892), *overruled in part, Tipton v. State*, 97 So.2d 277 (Fla.1957).

At trial appellant testified that he went to the apartment he shared with Jane Albert on the afternoon of Monday, October 4, 1976 and in a bedroom found the body of James Stone. As he entered the room, he saw Jane Albert putting a knife down on a table. He said he proceeded to clean up the room, put the body in the box he had built for toys, and later removed it from the apartment and dropped it in the river. He said he assisted in covering up the evidence of the crime in order to protect Albert from prosecution and that he later confessed to the crime for the same reason.

Appellant's attorney then turned to the events leading up to his confession. After his arrest in California, he was questioned there by Jacksonville police officers. He testified that he did not tell them anything, but only "asked them how Jane and Stephanie were." He also asked where they were, and learned that they also were being questioned. Later he consented to being returned to Florida after he learned that Albert had returned there. He testified: "I just wanted to be close to her."

Appellant returned to Florida in custody on Friday, October 22. On the following Sunday, he testified, he was questioned for eleven or twelve hours. That night the detectives read him a statement they said Albert had made. He told the jury that he could not believe she had made the statement and he wanted to hear it from her. After several hours of questioning, he said, they allowed him to listen to her on a one-way telephone; he was not able to talk back to her on this telephone. After hearing her statement, he agreed to show them where the box had been dropped in the river.

Q Why did you agree to take them out to the bridge at that point?

A Because I decided to plead guilty.

Q Why?

A Because I didn't want to live. I was—

Q All right.

A I was—unless you lived my life you wouldn't understand.

Q Did you take them out to the bridge?

A Yes, sir.

Q You showed them, didn't you?

A I showed them approximately where I figured it was, about where the truck stopped when we dumped the box.

Q Why didn't you talk to Officer or Sergeant Miles before the following Friday?

A I was just going to plead guilty, and then on Thursday I saw a thing on the news with Mr. Greene and a lady reporter and they were asking—

Q Don't say what they said.

A Anyway, it was about what they were going to do with Jane. It led me to believe that they hadn't given her immunity.

Q That they hadn't or they had?

A That they hadn't given her immunity. I had already decided—as a matter of fact, I tried to plead guilty the first day they took me to court and—but I had already decided to plead guilty, but when this news report came on I was still in doubt whether or not Jane was going to get immunity or not and I called Sergeant Miles.

Q You say you called. You called him direct?

A Well, I talked to the chaplain first. The chaplain said he was too busy. I got a guard at the jail. A guard is actually the one that called him. This guard got him to come over to the jail and he came over to the jail and he says, "Well,—

Q All right, sir. Who had you seen that week?

A No one except Sergeant Miles and Detective Starling.

Q Had you talked to anyone on the phone?

A I had talked to my mother two or three times, except they came up with—the phone doesn't come around to the cell for two or three days. They said the phone line was out of order on that side of the floor. So, there was two or three days I didn't talk to anyone. Besides that, no one—I put in for to get a lawyer when I first got into town. They took me to a bond hearing on Saturday, the 22nd. I had signed a piece of paper asking for a lawyer, but I never got a lawyer. Nobody ever came to me.

Q You never talked to a lawyer?

A No one ever came over to the jail from the Public Defender's Office or anyplace.

Trial transcript at 808–10.

The state's lawyer objected to any further questioning pertaining to whether appellant was represented by counsel or had asked for counsel during the interrogation that culminated in his confession. The prosecutor argued that any evidence going to the question of whether his confession was voluntary was irrelevant. Defense counsel argued that the line of questioning that he wished to follow was intended to elicit testimony going to appellant's state of mind at the time. The court ruled that there could be no further testimony of the circumstances surrounding interrogation. Then, appellant testified as follows:

Q Mr. Palmes, do you recall giving a statement on the 28th—

A Yes, sir.

Q —of October?

A Yes, sir.

Q Now, what you have told the Court today is different from that.

Can you tell us why you gave that statement at that time?

A To clear Jane so that nothing would happen to her. I was under the impression that she hadn't been given immunity at that time.

Q Why are you telling the story differently now?

A Because nothing can happen to her from what I understand; she has been given immunity and they can't prosecute her. If she hadn't been given immunity I wouldn't be here right now.

Trial transcript at 818.

[21] Even though the court improperly sustained the objection, the defense was still able to present to the jury a substantial account of the operation of circumstances on appellant's state of mind at the time of his confession. This is an important factor in the determination of whether the error was harmless. Furthermore, the evidence of guilt was overwhelming and it is highly unlikely that a more complete account of the circumstances of the confession would have changed the jury's evaluation of the

question of guilt. We hold, therefore, that the error was harmless.

The Court has given careful consideration to appellant's other contentions pertaining to the judgment of conviction and finds them to be without merit. The verdict of the jury was supported by competent, substantial evidence and therefore we hold that the evidence is sufficient to support the judgment of conviction. We affirm the conviction.

IV.

[22, 23] We now come to the question of the propriety of the sentence of death. There was no jury recommendation because appellant waived his right to have the jury hear evidence on the question of sentence. One who has been convicted of a capital crime and faces sentencing may waive his right to a jury recommendation, provided the waiver is voluntary and intelligent. Upon finding such a waiver, the sentencing court may in its discretion hold a sentencing hearing before a jury and receive a recommendation, or may dispense with that procedure. *State v. Carr*, 336 So.2d 358 (Fla. 1976); *Lamadline v. State*, 303 So.2d 17 (Fla.1974). The record shows that the court inquired into appellant's waiver and found it to be intelligent and voluntary.

[24, 25] Appellant contends that the record shows that the judge did not consider the evidence offered in mitigation. After adjudicating appellant guilty, the court set a time for the sentencing hearing and meanwhile ordered a presentence investigation. At the sentencing hearing, after hearing all the evidence and argument, the judge stated her findings, which she read from a pre-prepared order. Appellant argues this shows no consideration was given to his evidence and argument offered at that hearing. The fact that the judge recited findings from an order prepared before the final sentencing hearing does not compel the conclusion that she did not give the required consideration to the evidence presented by the defense. All of the court's findings of aggravating circumstances were based on evidence that was adduced at the trial proper. Thus there was nothing wrong with her having these findings and considerations in mind at the start of the sentencing hearing. The fact that the pre-prepared order found that there were no mitigating circumstances does not show that the judge did not consider the evidence and argument offered in mitigation. The recitation and filing of the sentencing findings merely indicate that the court concluded that nothing presented by the defense at the hearing required her to add to or change her pre-prepared findings.

A copy of the pre-sentence investigation report was provided to counsel for both parties before the sentencing hearing.

The judge found four aggravating circumstances. She found that appellant was previously convicted of a felony involving violence, section 921.141(5)(b), Florida Statutes (1977), that the murder of James Stone was committed "while the defendant was engaged . . . in the commission of" the felony of robbery, *id.* § 921.141(5)(d), that the murder was committed for pecuniary gain, *id.* § 921.141(5)(f), and that the murder was heinous, atrocious, and cruel. *Id.* § 921.141(5)(h).

[26] The finding that appellant was previously convicted of a felony involving violence to the person was based upon a conviction for manslaughter. The previous conviction was rendered pursuant to a plea of guilty to manslaughter in a prosecution initiated by an indictment charging first-degree murder. We therefore hold that the previous conviction supported the finding of this factor.

[27-29] Under the circumstances of this case, the factor of commission in connection with a robbery and the factor of pecuniary gain are both based on the same aspect of the crime. Therefore, only one aggravating circumstance was established by these considerations. *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). The improper double recitation of the factor, however, was harmless error. The judge found that there were no mitigating cir-

cumstances, and on this review we approve her finding. Therefore it is beyond doubt that the weighing process was not affected injuriously to the appellant. For this reason the error does not require resentencing. *Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

[30] The finding that the murder was especially heinous, atrocious, and cruel, under the Court's previous constructions of this statutory factor, was amply supported by the evidence. *See, e. g., Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979); *Funchess v. State*, 341 So.2d 762 (Fla.1975), *cert. denied*, 434 U.S. 878, 98 S.Ct. 231, 54 L.Ed.2d 158 (1977).

The evidence was sufficient and there was no reversible error. Therefore we affirm the conviction of first-degree murder. There were three aggravating circumstances, supported by the evidence, and no mitigating circumstances. Therefore we also affirm the sentence of death.

It is so ordered.

ADKINS, BOYD, OVERTON, ENGLAND and ALDERMAN, JJ., concur.

SUNDBERG, C. J., concurs in result only.

Andrew SANDEGREN et al., Appellants,

v.

STATE of Florida ex rel. SARASOTA COUNTY PUBLIC HOSPITAL BOARD, Appellee.

No. 58868.

Supreme Court of Florida.

March 12, 1981.

Rehearing Denied May 20, 1981.

Hospital sought writ of mandamus against county, mental health board, and clinic, asking for payment of county's 25% share of costs for services rendered by hospital, pursuant to comprehensive mental health plan statute. The Circuit Court, Sarasota County, Stephen L. Dakan, J., upheld constitutionality of comprehensive mental health plan statute, found county had clear legal duty to match state funds, and ordered county to pay $182,994.47 directly to hospital. Appeal was taken. Upon transfer of case from Second District Court of Appeal, the Supreme Court, McDonald, J., held that: (1) comprehensive mental health plan statute does not unconstitutionally delegate legislative power; (2) comprehensive mental health plan statute does not improperly infringe on local taxing power; (3) county had clear legal duty to fulfill obligation to match state funds in funding of mental health services, imposed by comprehensive mental health plan statute; (4) failure to issue order setting case for trial did not warrant vacation of judgment since additional time was afforded to conclude case if requested; (5) motion for continuance of trial was properly denied; and (6) exhibit consisting of 16-column compilation of dates, total charges, and payments from various sources for over 1,000 mental patients treated by hospital during pertinent time was admissible as business records.

Affirmed.

Adkins, J., dissented.

1. Constitutional Law ⇐62(10)
Counties ⇐132

Comprehensive mental health plan statute which requires that local governments match state funds for community health services on three to one basis does not unconstitutionally delegate legislative power, either on its face or as applied to county, clinic, and mental health board. West's F.S.A. §§ 394.451 et seq., 394.76(9).

2. Municipal Corporations ⇐69

State Constitution contains nothing which prohibits legislature from enacting

ORIGINAL

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

TIMOTHY CHARLES PALMES,

Petitioner

-vs-

STATE OF FLORIDA,

Respondent.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

TIMOTHY CHARLES PALMES,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Respondent accepts those portions of the Petition for Writ of Certiorari setting forth the Citations to the Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved found on pages one through two of the Petition.

Respondent does not accept Petitioner's Questions Presented, in that said questions are argumentative and do not objectively present a concise issue to be reviewed.

Respondent does not accept Petitioner's statement as to How the Federal Questions Were Raised and Decided Below. Specifically, Petitioner urged to the Florida Supreme Court on direct appeal that the trial court erred in denying his Motion to Suppress on two grounds: 1) that Petitioner's confession on October 29, 1977, came one day after Petitioner was indicted for the crime charged, and therefore, a very damaging confession

was obtained from Petitioner in the absence of counsel contrary to Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964); and 2)that the totality of the evidence presented failed to demonstrate that Petitioner freely and voluntarily waived his right to counsel and therefore, his confession was inadmissible. The Supreme Court in reviewing the issues presented concluded that after repeated Miranda warnings as to his right to counsel and to have counsel present during questioning, Petitioner made a recorded confession which took place at his own request.

As to Petitioner's second issue pertaining to whether the trial court wrongfully limited evidence before the jury regarding the question as to the voluntariness of Petitioner's confession, the Florida Supreme Court concluded that although error occurred, the totality of the circumstances did not result in reversible error.

The third question presented was whether Petitioner was entitled to a jury instruction regarding accessory after the fact. The Florida Supreme Court in reviewing this issue concluded that while it is axiomatic that a defendant is entitled to a jury instruction on the theory of his defense, the issue before the Florida Supreme Court was a State question as to whether accessory after the fact is a lesser included offense to the crime of murder in the first degree. The Supreme Court in deciding said issue concluded:

> Since the jury could not legally convict the defendant of accessory after the fact, no purpose would be served by requiring that they be instructed on the charge. Therefore, the court did not err in refusing to instruct the jury about accessory after the fact either as a defense or as a lesser included offense.

[Palmes v. State, 397 So.2d 648, 652 (Fla. 1981)]

QUESTIONS PRESENTED

I.

WHETHER PETITIONER INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION WHERE PETITIONER CONFESSED TO THE CRIME CHARGED AFTER BEING GIVEN MIRANDA WARNINGS WITHOUT THE PRESENCE OF COUNSEL.

II.

WHETHER THE STATE TRIAL COURT'S PRE-TRIAL HEARING DETERMINATION AS TO THE VOLUNTARINESS OF PETITIONER'S CONFESSION LIMITS THE REVIEW BY THE JURY AS TO THE VOLUNTARINESS ISSUE WITH A FULL HEARING OF ALL RELEVANT EVIDENCE.

III.

WHETHER PETITIONER WAS ENTITLED TO A JURY INSTRUCTION ON ACCESSORY AFTER THE FACT BASED ON THE CRIME CHARGED AND THE EVIDENCE PRESENTED AT TRIAL.

STATEMENT OF THE CASE

Respondent accepts those portions of the Statement of the Case set out by Petitioner in his Petition for Writ of Certiorari which are not argumentative. Respondent would invite this Court to review the Statement of Facts as set forth by the Florida Supreme Court in Palmes v. State, 397 So.2d 641 (Fla. 1981) which provides:

> Appellant lived in an apartment with his girlfriend, Jane Albert, her daughter, Stephanie, and a friend, Ronald Straight. The Appellant became acquainted with Ms. Albert's employer, James Stone. The evidence shows that Appellant, Albert, and Straight plotted the murder and robbery of Stone.
>
> On October 3, 1976, Appellant, Straight, and Albert purchased lumber, hardware, and cement from which Appellant built a box large enough to hold a man's body. The next day, Albert told her employer that a girl named Nancy was waiting for him at the apartment. She then called Appellant to let him know that Stone was on his way. Apellant told Stephanie to answer the door and tell Mr. Stone that Nancy was waiting in the back room. Ronald Straight waited behind the front door with a gun. After Stone entered the apartment, Straight directed him to the back bedroom where Appellant was waiting. The two men then bound Stone's hands and feet with wire and taped his mouth. They placed a garbage bag over his head and hit him with a hammer and stabbed him approximately 18 times. This sequence of events took about half an hour. At one point, Appellant had the child, Stephanie, come into the room and observe the victim lying in the burial box, mortally wounded.
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> The next day, Appellant and Straight moved their possessions, together with the box containing the body, out of the apartment and into a rental truck. They took possession of the victim's watch, credit cards, and car. Albert took about $3100 in cash from Stone's furniture store. They spent the night at a motel.

The next day, Appellant and Straight drove the rental truck to the Buckman Bridge and threw the box into the St. John's River. The Appellant, Straight, Albert, and her daughter fled to California in the victim's automobile.

Police apprehended them in California. Appellant was brought back to Flroida and placed in the Duval County Jail. On October 22, 1976, police officers advised him of his constitutional rights and questioned him. On October 24, 1976, the officers again advised Appellant of his constitutional rights and interrogated him further. They read to him excerpts from a statement made by Jane Albert. He refused to make any statements until after he had spoken to her. Although he declined to sign a written waiver of his rights, he did not request an attorney and he voluntarily answered questions. Afterwards, he showed police officers the place on the bridge where the body was dropped. On October 28, 1976, an indictment was returned accusing Appellant of murder in the first degree. On October 29, the Appellant asked to see the investigating officers. After again being advised of his rights, the Appellant specifically stated that he did not want to see a lawyer. He signed a waiver and made a detailed statement of his participation in the murder. The statement was recorded and signed.

At Appellant's first appearance on October 23, 1976, the judge entered an order appointing the public defender to represent him. The Office of the Public Defender never undertook representation, however, and on October 29, requested and was granted permission to withdraw from representation on the grounds of conflict of interest. Appellant never met with a representative of that office. Throughout the course of his interrogation by police, he never asked to see an attorney.

[397 So.2d at 650-651]

REASONS FOR NOT GRANTING THE WRIT

PETITIONER WAS NOT DENIED HIS RIGHT TO ASSISTANCE OF COUNSEL AND HIS RIGHT AGAINST SELF-INCRIMINATION.

Petitioner asserts that the trial court and the Florida Supreme Court erred in denying his Motion to Suppress the confession given in that said confession was made after he was indicted and without the aid and succor of counsel. Specifically, Petitioner asserts:

> In the instant case, sheriff's office personnel had continued to interrogate the Petitioner after learning that counsel, the Public Defender's Office, had been assigned to him. They obtained an inculpatory statement after Petitioner's indictment without his being aided by counsel, cf. Massiah v. United States, 377 U.S. 201 (1964).

[Petitioner's Petition, p.7]

The Florida Supreme Court in determining this issue held:

> The Appellant contends that he was denied his Fifth and Sixth Amendment rights to due process and the assistance of counsel because his confession was obtained after indictment and in the absence of counsel. In support of this contention, he cites Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and Williams v. State, 188 So.2d 320 (Fla. 2 DCA 1966) cert.discharged 198 So.2d 21 (Fla. 1967). Massiah v. United States concerned a defendant who, after being indicted, retained a lawyer pleading not guilty and being released on bail made incriminating statements to one of his co-defendants which were detected by means of a radio transmitter. The court held the statement inadmissible under the Sixth Amendment guarantee of the right to assistance of counsel. Williams v. State was a case where the investigating officer, "knowing that the defendant . . . had been in jail for three weeks . . . that he had already been indicted for first degree murder, and that he had a lawyer and who his lawyer was, took the defendant out of his jail cell and transported him to a small room . . . in which room there was only a desk and three chairs. They went inside, closed the door, sat down . . ." 188 So.2d at

325. There, the officers solicited an incriminating statement.

These cases do not control the situation at bar. In the instant case, the defendant had already been indicted but was not yet represented by counsel. He was repeatedly advised of his right to consult with counsel and to have counsel present during questioning. The formal appointment of the Public Defender at first appearance did not initiate legal representation since nothing was done towards actually providing legal counsel. The interview at which Appellant made the recorded confession took place at his own request. He made no request to speak to an attorney and executed a written waiver of counsel. The right to counsel during questioning can be waived. Witt v. State, 342 So.2d 497, Fla. cert.denied 434 U.S. 935, 98 S.Ct. 422, 54 L.Ed.2d 774 (1977). Investigating officers are not required to try to convince a defendant that he needs an attorney. State v. Craig, 237 So.2d 737 (Fla. 1970). We therefore hold that the court properly admitted the confession into evidence.

[397 So.2d at 651-652]

In Florida, pursuant to McDole v. State, 283 So.2d 553 (Fla. 1973), the test for admissibility of a confession is by a preponderance of the evidence. In the instant case, on all occasions when Petitioner was subject to questioning, said questioning was preceded by Miranda warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966). There is no assertion to the contrary. Petitioner asserts that he was denied his right to have counsel present and his right against self-incrimination was violated. The record reflects that preceding his recorded confession, Petitioner summoned Sargeant Miles, and told Sargeant Miles that he wanted to talk to him. The record below reflects that Sargeant Miles promptly and painstakingly inquired of Petitioner as to whether he wanted counsel present at the taking of his confession.

Q. Tim, going back to the middle portion of your rights, do you understand that you have the right to talk to a lawyer?

A. Yes, I do.

Q. Do you want to talk to a lawyer?

A. No, I don't believe there is any need.

Q. Do you realize that you can have a lawyer with you during this statement or during any questioning if you so desire?

A. I understand that.

Q. Would you like for us to call an attorney for you?

A. No.

Q. Would you like for us to call the Public Defender's Office?

A. No.

Q. Would you like for us to call the judge?

A. No, I'm ready to make a statement on my own. I believe my own mind in this thing is enough. I understand what a lawyer would advise me, especially if he is planning on trying to defend me. I plan to plead guilty in the case, anyway. So, I think I'm going to go ahead and make a statement and get it off my mind now.

While Petitioner only signed a written waiver just before his recorded statement, as noted in United States v. Sawyer, 504 F.2d 878 (5th Cir. 1974) cert.denied 95 S.Ct. 1578, simply because a rights' waiver is not signed does not mean that a statement or confession is per se inadmissible. The Fifth Circuit noted in Sawyer:

> There is nothing in the circumstances surrounding Appellant's interview to indicate that his statement to the police regarding his participation in numerous robberies including that of the Biscayne Federal Savings and Loan, charged here were not voluntarily given despite the fact that he

> said he was not going to "sign anything." Appellant was repeatedly given his warnings, and, immediately before he made this statement, he read a Miranda card and said that he understood his rights.

[504 F.2d at 879]

See also, United States v. McDaniel, 463 F.2d 125 (5th Cir. 1972) cert.denied 413 U.S. 919; United States v. Devall, 462 F.2d 137 (5th Cir. 1972).

Whether Petitioner was influenced by the fact that his girlfriend, Jane Albert, was given immunity or not given immunity in the instant cause, after repeated warnings, matters not--Petitioner elected to confess to the crime charged. As noted in Faretta v. California, 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525 (1975), the State cannot force counsel on anyone who wants neither the advice of counsel nor counsel's assistance.

In United States v. Deloy, 421 F.2d 900 (5th Cir. 1970), the Fifth Circuit Court found that Massiah v. United States, 377 U.S. 201 (1964) had not been violated wherein a post-indictment incriminating admission was made without the benefit of counsel's presence at said time.

> In these circumstances, we hold that Deloy's statement to Agent McNamara were admissible in evidence. He was not coerced, cajoled, or tricked into an involuntary statement. The government did not elicit, solicit, or even suggest a statement and did not otherwise treat the defendant unfairly. He was allowed to speak only after a full and adequate Miranda warning on each occasion. We do not comprehend Massiah as a sweeping mandate tainting all post-indictment statements made by a defendant without the presence of counsel. Police officers were not made constitutionally deaf to the uncoerced, insistant, and untricked statement of a properly warned defendant. Whatever the precise boundaries of the Massiah rule, here, not even the threshhold was reached.

[421 F.2d at 902-903]

In Edwards v. Arizona, ___ U.S. ___, 29 Cr.L. 3037 decided May 18, 1981, this Court, while not specifically addressing Edwards' claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments as construed and applied in Massiah v. United States, supra, observed:

> Miranda thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Here, the critical fact as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holding of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

[29 Cr.L.R. at 3039]

This Court, in reversing, concluded however:

> In concluding that the fruits of the interrogation initiated by the police on January 20, could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at trial. The Fifth Amendment right identified in Miranda is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver. Rhode Island v. Innis,

supra, makes this sufficiently clear. 446 U.S. at 298, n.2.[9]

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[9]If, as frequently would occur in the course of a meeting initiated by the accused, the conversation is not wholly onesided, it is likely that the officers will say or do something that clearly would be "interrogation." In that event, the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent, and found to be so under the totality of the circumstances including the necessary fact that the accused, not the police re-opened the dialogue with the authorities. . .

[29 Cr.L.R. at 3040]

See also, United States v. Massey, 550 F.2d 300 (5th Cir. 1977) and United States v. Priest, 409 F.2d 491 (5th Cir. 1969).

Respondent would submit that this Court, even in a circumstance such as Edwards v. Arizona, supra, realized that even where a defendant seeks to invoke his right to counsel during interrogation, all subsequent encounters initiated by the defendant can effectively waive any right to have counsel present at said proceedings. In the instant cause, where the record is clear that Petitioner waived his right to counsel and never sought the assistance of counsel, the confession which resulted from a meeting initiated by Petitioner with Sargeant Miles was knowingly and voluntarily made without the need for counsel or the presence of counsel at said proceedings.

Petitioner has not demonstrated that the facts of his particular case present a valid claim that his constitutional rights were thwarted. Moreover, any suggestion that he was unduly influenced or that his mental state was so impaired that he could not knowingly and voluntarily waive the presence of counsel prior to giving his recorded confession, must fall

on deaf ears. There was no claim presented to the trial court nor the Florida Supreme Court that Petitioner's mental state or his mental faculties were impaired to the extent that he could not knowingly and voluntarily waive his right to counsel. In an attempt to interject a parade of horribles in the instant cause by asserting same, Petitioner should be denied review pursuant to Cardinale v. Louisiana, 394 U.S. 437 (1969).

WHILE THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO THE ATTEMPT BY DEFENSE COUNSEL TO ELICIT FROM PETITIONER TESTIMONY CONCERNING THE CIRCUMSTANCES OF HIS CONFESSION, SAID ERROR DID NOT RESULT IN AN ERROR REQUIRING REVERSAL.

At trial, Petitioner's trial counsel attempted to elicit from Petitioner the facts and circumstances surrounding the confession that obtained. The State objected and the trial court sustained said objection. The Florida Supreme Court in reviewing this issue observed:

> It has been said that the application of this rule requires that the evidence presented to show the voluntary nature of the confession must be presented anew for the jury's consideration. (cites omitted). Thus, it must be suggested that because Appellant did not testify at the pre-trial hearing on the admissibility of the confession, he was precluded from giving his personal account of the circumstances for the jury. The functions of the judge and jury, however, are different. It is not the function of the jury to reconsider whether the confession was voluntary. (cite omitted). At trial, Appellant wanted to testify about his state of mind. In the absence of evidence of threats, promises, or the like, this testimony about state of mind would have been irrelevant at the pre-trial hearing. (cite omitted). This is because the inquiry at the pre-trial hearing on the admissibility of a confession is primarily the question of voluntariness; later, before the jury, the question is what weight to give the confession in determining guilt. The defendant's state of mind is relevant to this latter inquiry. (cites omitted). Therefore, the trial court erred in sustaining the objection.

> That the trial court's ruling was in error does not necessarily require reversal of the judgment. A judgment will not be reversed unless the error was prejudicial to the substantial rights of the Appellant. (cites omitted). This longstanding decisional rule has also been enacted as a statute. Section 924.33, Fla.Stat. (1977). Although in a capital case, this court will carefully scrutinize any error before determining it to be harmless, (cite omitted), it will not presume that there was prejudice. (cites omitted).
>
> In determining whether an erroneous ruling below caused harm to the substantial rights of the defendant, an appellate court considers all the relevant circumstances, including any curative ruling or event and the general weight and quality of the evidence. In other words, the court inquires generally whether, but for the erroneous ruling, it is likely that the result would have been different. (cites omitted). . . .
>
> While it is error not to receive in evidence "all the circumstances attending an extrajudicial confession . . . that the court may determine its admissibility and the jury consider its value" the error is harmless where substantially the same matters are presented to the jury through testimony of the same or some other witness. . .

[397 So.2d at 653-654]

Following a detailed recital of the facts and circumstances in the instant cause, Palmes v. State, 397 So.2d at 654-655, the court concluded:

> Even though the court improperly sustained the objection, defense was still able to present to the jury a substantial account of the operation of circumstances on Appellant's state of mind at the time of his confession. This is an important factor in the determination of whether the error was harmless. Furthermore, the evidence of guilt is overwhelming and it is highly unlikely that a more complete account of the circumstances of the confession would have changed the jury's evaluation of the question of guilt. We hold, therefore, that the

error was harmless.

[397 So.2d at 655-656]

In Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967), this Court noted that:

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

[386 U.S. at 22]

The court, in fashioning a harmless error/constitutional error rule concluded:

> . . . We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that the before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same results as that aimed at in our Fahy case.

[386 U.S. at 24]

In the instant cause, the Florida Supreme Court, after perusing the entire trial record, concluded that the trial court's error in granting the State's objection was diminished to the point of being insignificant in light of the testimony that was presented to the jury regarding the circumstances surrounding Petitioner making his confession. The jury was apprised of the reasons leading up to said confession and those efforts made on behalf of Petitioner to assert his rights.

Petitioner has presented no authority which would support his contention that the error in the instant case was harmful rather than harmless error. A federal question has not satisfactorily been developed herein which would entitle Petitioner to this Court's review.

PETITIONER WAS NOT ENTITLED TO A JURY INSTRUCTION AS TO ACCESSORY AFTER THE FACT WHERE HE WAS CHARGED WITH MURDER IN THE FIRST DEGREE AND THE EVIDENCE AND HIS CONFESSION DISPELLED SAME, AND ACCESSORY AFTER THE FACT IS NOT A LESSER INCLUDED OFFENSE TO THE CRIME OF MURDER IN THE FIRST DEGREE.

Petitioner's last issue for review asserts that the trial court erred in not instructing the jury as to the offense of accessory after the fact. The Florida Supreme Court in reviewing said issue observed that while it is axiomatic that a defendant is entitled to jury instruction on the theory of his defense,

> that a person committed a crime other than the one he is charged with is not a legal defense requiring a jury instruction.

[397 So.2d 652]

The Florida Supreme Court went on to say:

> Furthermore, the crime of accessory after the fact is not a lesser included offense of the crime of premeditated murder. (cite omitted). Therefore, the defendant was not entitled to an instruction on accessory after the fact as a lesser included offense. (cites omitted). If the jury had been instructed about accessory after the fact, a conviction on that charge would not be valid since it would not be supported by the facts alleged in the indictment. (cites omitted). Since the jury could not legally convict the defendant of accessory after the fact, no purpose would be served by requiring that they

> be instructed on the charge. Therefore, the court did not err in refusing to instruct the jury about accessory after the fact either as a defense or as a lesser included offense.
>
> [397 So.2d at 652]

Petitioner in the instant cause confessed to killing James Stone. The facts and circumstances developed at trial reveal that he was a full participant in this murder and that not only did he plan the murder and the robbery of Jim Stone, but helped build his coffin.

While couched in constitutional terms, Respondent would respectfully urge that the third issue before this Court is a state question to be resolved by state law and not of the magnitude reaching a federal question.

The decision relied on by Petitioner in Beck v. Alabama, 447 U.S. 625 (1980) is distinguishable from the instant cause in that first, the offense excluded in the Beck decision was or (depending on the evidence) could have been a lesser included offense of the main crime charged, and two, under Florida law, would have been a required instruction.

In the instant cause, accessory after the fact has been held in Florida to be not a lesser included offense of the crime charged. While Petitioner is entitled to instruction as to his defense theory, there was no evidence presented at trial which would support said instruction.

Therefore, based on the foregoing, the Florida Supreme Court did not err in concurring with the trial court's ruling that an instruction regarding accessory after the fact was inappropriate in the instant cause.

CONCLUSION

Petitioner has failed to present any federal question which would entitle him to review by this Court. Each issue raised sub judice was addressed by the Florida Supreme Court and decided correctly against Petitioner. The record below and the reasoning of the Florida Supreme Court reflects that Petitioner's confession was freely and voluntarily and knowingly given after he was informed of his constitutional rights pursuant to Miranda v. Arizona, supra, and after he repeatedly demonstrated no desire to have counsel present at the meeting initiated by Petitioner. Moreover, any error that may have occurred regarding the trial judge's limiting of defense counsel's inquiry of the Petitioner regarding the circumstances leading up to said confession was minimal at best, since as noted by the Florida Supreme Court, evidence was presented to the jury regarding same. Finally, the instructions sought to be given regarding accessory after the fact was inappropriate and not supportive of the defense's theory of the case. It was not a lesser included offense of the crime charged and for that reason alone was equally inqppropriate to the instant cause. Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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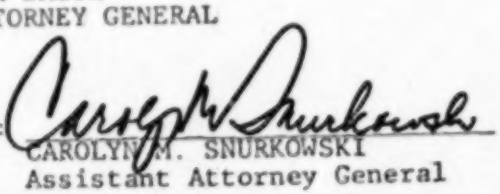
By: 
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